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Little Citizens and Their Families

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LITTLE CITIZENS AND THEIR FAMILIES

*Peggy Cooper Davis**

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INTRODUCTION

As a city, we are in some way responsible for each child in our midst. The obligation and opportunity to stand *in loco parentis*—in the place of a parent—is applicable to state and local governments to some highly contested and complicated extent. The contests and complexities are revealed in our family law jurisprudence, for although the field of family law is often belittled or trivialized, it is in family jurisprudence that a government’s obligations to its people are perhaps most tellingly tested. In what follows, I will explore the reach and limits of those obligations.

First, I will discuss the concept of human dignity and how it relates—or should relate—to making judgments about what a government owes to its child citizens. I will draw on constitutional theories that have come to prominence since the World Wars and caused governments around the world to address more directly the

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positive duties states may owe to their people and that their people may owe to one another. These theories are instructive, despite the ironic fact that they simultaneously enhance our sense of duty to children and our duty of restraint against invading their families' autonomy.

Having laid a foundation of dignitary principles, I will discuss a set of family law cases that have tested the limits of governments' responsibilities to children and to their families. I will first discuss the old chestnuts, *Meyer v. Nebraska*¹ and *Pierce v. Society of Sisters*,² two Supreme Court cases from the 1920s that laid the groundwork for the still bitterly contested doctrine of substantive due process. Next, I will discuss *Wisconsin v. Yoder*,³ the 1972 Supreme Court case in which Amish families challenged a requirement that they send their children to school until the age of sixteen. Finally, I will discuss *DeShaney v. Winnebago County Department of Social Services*⁴ and *Castle Rock v. Gonzales*,⁵ two cases in which the Supreme Court found that state and local governments could not be held accountable for lapses in their efforts to protect families and children. I will conclude with a comment on the usefulness of the concept of human dignity in calibrating governments' and families' competing authority over, and complementary duty towards, their children.

I. THE CONCEPT OF HUMAN DIGNITY

I set out my understanding of human dignity rather circuitously. I start with a definition of fundamental right, as that term is understood in United States constitutional law. I then link the notion of fundamental right and the notion of human right. Only then will I be in a position to describe how I understand human dignity in the context of American constitutional and political thought.

The Supreme Court gives special protection to certain rights, regardless of whether they are mentioned in our Constitution's text, because these rights are deemed to be basic components of human freedom.⁶ Histories and traditions of recognizing a right that is

1. 262 U.S. 390 (1923).

2. See *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925).

3. 406 U.S. 205 (1972).

4. 489 U.S. 189 (1989).

5. 545 U.S. 748 (2005).

6. See *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) (“[T]he ‘liberty’ specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*,

fundamental in this way appear to be safe indicators that a right is fundamental.⁷ However, there are reasons to prefer a test that first asks whether the exercise of the right is socially benign, and if it is, then asks whether the suppression of that right is socially justifiable.⁸ Careful balancing of calls for order and for liberty can seem more defensible than reference to what we have customarily done.⁹

As the world has grown smaller, lawmakers in the United States and elsewhere have increasingly looked beyond national borders for guidance in determining what rights are so fundamental that they should be protected by national and international law.¹⁰ At the same time, transnational bodies have undertaken codification of individual and collective rights that are broadly understood to be fundamental.¹¹ In transnational contexts, one may speak not just of the civil rights that should be guaranteed by a polity to its members, but also more generally of *human* rights that should be guaranteed to all. Since World War II, as international rights codifications have proliferated, the use of the term human rights has become more common in legal discourse and is now commonly associated with the concept of human dignity.¹²

In this same post World War II period, the concept of human dignity has come to carry new associations: those who drafted new constitutions in response to acts and political arrangements that were widely regarded as atrocities identified respect for human dignity as the principle those atrocities had violated. Most notably, Germany

316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *ibid.*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, [*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992)].").

7. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612–13 (2015) (Roberts, C.J., dissenting).

8. See *id.* at 2602 (majority opinion) ("The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.").

9. See *id.* at 2598 (describing an analytic method that "respects our history and learns from it without allowing the past alone to rule the present").

10. See MICHAEL J. PERRY, *THE POLITICAL MORALITY OF LIBERAL DEMOCRACY* 57 (2010).

11. The United Nations is required to publish all such treaties. See U.N. Charter art. 102, ¶ 1. Such treaties are also available online. See UNITED NATIONS TREATY COLLECTION <https://treaties.un.org> [<https://perma.cc/L7Y2-DLQU>].

12. See Bas de Gaay Fortman, *Equal Dignity in International Human Rights*, in *THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY* 355–61 (Marcus Düwell et al. eds., 2014).

after the Holocaust and South Africa after apartheid built new constitutions with cornerstones of respect for human dignity.¹³ This, I argue, was a key development toward understanding human dignity through protest against its denial.

Contemporary scholars point out that while dignity was once a term referencing the accouterments of noble rank or status, the term human dignity is now understood in legal and moral discourse to reference the properties or entitlements of “human beings as human beings, not dependent on any particular additional status.”¹⁴ To affront human dignity is, then, to treat a human being or a group of human beings without regard for their entitlements as members of the human species. In a world grown increasingly suspicious of hierarchy, it is, to borrow a religious concept, to treat them not as if they were a little lower than angels, but as if they were something lower still.¹⁵

All that I have said invites the following question: how do we decide what behavior is an affront to the dignity of human beings? I propose that we decide what affronts human dignity by reference to two kinds of human aversion. First, affronts to human dignity are (or would be in a condition of freedom) intolerable to the victim or subject. Second, they are intolerable in the consensus judgment of observers. They are acts that human beings will neither endure without coercion nor tolerate without general approbation.

While this appears to be a smell test—“I know it when I see it”—it is one of a particular and not entirely subjective kind. It is a collective smell test verified in two important ways: (1) by resistance and counterdemonstration on the part of those subjected to the practice, and (2) by reasoned protest, both by those subjected to the practice and by others.

The rights-seeking process of resistance, counterdemonstration, and reasoned protest plays out on a micro level whenever an infringement or denial of human dignity is challenged on constitutional grounds. Cases involving children and their families

13. See Peggy Cooper Davis, *Responsive Constitutionalism and the Idea of Dignity*, 11 U. PA. J. CONST. L. 1373, 1373 (2009).

14. Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655, 656–57 (2008).

15. Conversely, we might agree with the Stoics that we affront human dignity when we engage in behavior that is unworthy of human creatures or “inhumane.” In this alternative sense, dignity is a quality that we achieve through our behavior, whereas in the former sense dignity is inalienable. These two understandings of dignity are not congruent. We might think it undignified (unworthy of a human being) to torture any animal, but this is not to say that the animal is endowed with human dignity.

are special in that they often call for reconciliation of the different, sometimes competing dignitary or constitutional rights of various family members—often those of children and those of their parents.

II. CASE ILLUSTRATIONS

The following case analyses embody this requirement of simultaneous respect. In assessing each, we are required to balance the dignitary status a government owes to children with the dignitary status it owes to the adults who care for them.

The first cases, *Meyer* and *Pierce*, are usually cited as pillars of the principle that parents have a constitutional right to maintain and manage, without official interference, custody and control of their children.¹⁶ However, *Pierce* should also be remembered as the case that dampened, and perhaps precluded, wholehearted efforts to provide universal, high quality education. Therefore, it holds lessons about the tension between educating young citizens in an economically diverse community, and honoring the wishes and ambitions of all parents.

Next, I will discuss *Wisconsin v. Yoder*.¹⁷ Like *Pierce*, it stands for the principle of parental autonomy. However, it raises questions about a child's right to know and draw from worlds beyond a community that is isolated, whether by choice or circumstance. Therefore, it holds lessons about the tension between subcultural integrity and cosmopolitan exposure.

Finally, I will discuss the cases from Castle Rock, Colorado and from the town of Neenah, in Winnebago County, Wisconsin that interrogate communities' obligations to police families for the protection of vulnerable family members.¹⁸ These cases, therefore, speak to the tension between assuring public safety and protecting privacy.

I will argue that thoughtful and simultaneous respect is necessary—although I cannot claim that it is sufficient—to successfully manage the tensions between protecting and nurturing a city's youngest

16. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

17. 406 U.S. 205 (1972).

18. See *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (holding that an individual does not have a right to police enforcement of restraining orders where police failed to enforce a mother's restraining order against her children's father and the father abducted and murdered their children); *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (holding that under the First and Fourteenth Amendments, a state cannot compel an Amish family to cause their children to attend formal high school).

citizens and guarding the democratic freedom owed to all of its citizens. I will stress the importance of respect across genders, classes, sub-cultures, and generations. At bottom, though, I want to call attention to the kind of respect that is described in human rights discourse as the respect warranted by recognition of the inherent dignity of every human being.

**A. *Meyer v. Nebraska* and *Pierce v. Society of Sisters*: Families,
Education, and Economic Diversity**

Robert Meyer was a teacher who unlawfully taught reading in the German language to a ten-year-old child in a one-room parochial school in Nebraska.¹⁹ The Society of Sisters operated a parochial school in Oregon, and the Hill Military Academy was a for-profit private school in Oregon.²⁰ These parties were joined by parents of children in their schools to challenge state laws that were passed with disparate motives; some xenophobic and others, expressions of collective responsibility.²¹

World War II inflamed parochial and nativist sentiments, as well as narrow patriotism.²² At the same time, communities acted on a desire to promote a healthy democracy by making basic education universal.²³ This mix of sentiments yielded public school requirements, and prohibitions against teaching children languages other than English, that were advocated both as protections against “foreign” influences and as guarantees of an egalitarian and well-functioning democracy.²⁴

Advocates for the parents, teachers, and private and parochial schools challenged these laws, stressing the more prominent and more assailable motives: the need to promote the right kind of patriotism,

19. See *Meyer v. Nebraska*, 262 U.S. 390, 396 (1923).

20. See *Pierce*, 268 U.S. at 531–32 (1925).

21. See DAVID TYACK ET AL., *LAW AND THE SHAPING OF PUBLIC EDUCATION 1785–1954*, at 155 (1987); see also Barbara Bennett Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1041–46 (1992) (discussing the concept of the child as the parents’ property and the property rights invoked by the parents in these cases).

22. See ROBERT K. MURRAY, *RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919–1920*, at 3–17 (1955); see also Woodhouse, *supra* note 21, at 1016–20.

23. See Kristen Safier, Note, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993 (2001); Woodhouse, *supra* note 21, at 1016–20.

24. See PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* (1997); Woodhouse, *supra* note 21, at 1016–20.

to reject foreign ideologies, and to inhibit foreign influence.²⁵ They condemned mandatory public schooling as a Platonic and Bolshevik idea that had no place in a free democracy.²⁶ The Supreme Court took the bait.

In *Meyer*, the case challenging a state law restricting foreign language education, Justice McReynolds referenced the Spartan practice of placing fit six-year-olds in the care of guardians who would prepare them to be citizen warriors and concluded that such proposals were inconsistent with the United States' founding principles.²⁷ In *Pierce*, the case challenging a state law mandating public school enrollment, Justice McReynolds again wrote, this time for a unanimous Court, to say that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."²⁸ Thus, the Fourteenth Amendment came to stand for the principle of family liberty.²⁹ Yet at the same time, the Fourteenth Amendment came to be seen as a barrier against what might be our best collective response to class-based gaps in the quality of childhood education—gaps that grow as they mirror and perpetuate an expanding crisis of income disparity.

Concerns about self-perpetuating inequality should cause us to think freely and constructively about common schools and common systems of childcare. Écoles Maternelle in France are public pre-Kindergarten settings of such quality that: (1) few parents choose private options, and (2) there is little or no opposition to the public investment required to offer excellent care.³⁰ New York City Mayor

25. See Woodhouse, *supra* note 21, at 1016–20.

26. See *id.*

27. See *Meyer v. Nebraska*, 262 U.S. 390, 401–02 (1923).

28. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

29. The Court's reliance on the right to teach and to operate a school is a reminder that the case also stands for principles of economic liberty: "[Plaintiffs] asked [for] protection against arbitrary, unreasonable and unlawful interference with their patrons and the consequent destruction of their business and property." *Id.* at 536.

30. France has had a system of mandatory, free public education since the late nineteenth century. See Shanny Peer & John Burbank, *Focus on Early Learning: Lessons from the French École Maternelle*, ECON. OPPORTUNITY INST. 4, (Jan. 2004), <http://www.eoionline.org/wp/wp-content/uploads/early-learning/EcolesMaternelles-Jan04.pdf> [<https://perma.cc/87CK-X3X7>] ("There is broad public support for *école maternelle* in France, where early education and care are viewed not only as a private concern for parents, but as a public good and a public responsibility. The importance of pre-kindergarten and other services for young French children is unquestioned, taken for granted by parents, politicians, and the public alike. A consensus exists

Bill de Blasio's free pre-kindergarten initiative might be thought of similarly. It may be a mistake to criticize the program, as some have, as money wasted on families able to afford private systems of care. In fact, it might be hugely beneficial if New York children of all classes mingle in settings fit for the nurturing and socialization of young citizens.

B. *Wisconsin v. Yoder*: Open Opportunity and Cultural Diversity

Wisconsin v. Yoder solidified (at least temporarily) the principle of parental authority and autonomy announced in *Meyer* and *Pierce*, and cautioned against indifference to children's needs.³¹ It involved Amish parents who resisted a less onerous requirement than the one challenged in *Pierce*—a requirement that children attend some school, public or private, until the age of sixteen.³² These parents objected to formal education beyond the eighth grade and wished to remove their children from school whenever they had completed eighth grade.³³ They regarded secular high school as a corrupting experience and wished to engage their children instead in the program of learning through work that their religion required.³⁴

As the Court explained, the Amish community believed that “high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students,”³⁵ whereas “Amish society emphasizes informal learning-through-doing; a life of ‘goodness,’ rather than a life of intellect; wisdom, rather than technical knowledge, community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.”³⁶

The case was well-litigated on behalf of the Amish parents. The record contained expert testimony supporting the position that ordinary high school education would be both emotionally harmful to Amish children and destructive to the Amish community.³⁷ The expert testimony was buttressed with evidence that the Amish way of

across the political spectrum about the importance of *école maternelle*, and it receives support from all political parties. Not to support it would be political suicide for a politician.”).

31. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

32. See WIS. STAT. ANN. § 118.15 (West 2016); *Yoder*, 406 U.S. at 207.

33. See *Yoder*, 406 U.S. at 207.

34. See *id.* at 210.

35. *Id.* at 211.

36. *Id.*

37. See *id.* at 216–19.

rearing children produced citizens who were exceptionally law-abiding and self-sufficient as farmers and housewives.³⁸ On this record, the Supreme Court held, both as a matter of religious freedom and as a matter of constitutionally protected parental rights that Amish parents had to be exempt from the requirement to send their children to school until the age of sixteen.³⁹

The disposition of this case was not a foregone conclusion. The Court had long held that religious conviction could not protect plural marriages.⁴⁰ Moreover, it had held that religious and familial rights were too feeble to protect a family member's choice to permit her child to follow a religious obligation to distribute proselytizing literature.⁴¹ Nonetheless, only Justice Douglas voiced any dissent in *Yoder*. He dissented with respect to those cases in which the parent(s), not the child, had sought relief.⁴² With his eye simultaneously on the child's freedom and potential and on the parents' authority, Douglas argued that the decision affected the liberty interests of a child who "may want to be a pianist or an astronaut or an oceanographer."⁴³

Toleration of diverse child-rearing practices is key to our democracy. It assures that our culture is enriched by different grounding philosophies, values, and life choices. It protects against what Justice Douglas himself referred to in another context as a totalitarian theory of culture and governance.⁴⁴ Democracy means, in part, freedom to reject state-sanctioned orthodoxies and go one's own way. Still, democracies are concerned with the nurturance of young citizens, and it is not wrong to ask that they be given an educational—not to speak of a material (in the form of food, shelter, and protection

38. *See id.* at 222.

39. *See id.* at 232–34.

40. *See Reynolds v. United States*, 98 U.S. 145, 166–67 (1878).

41. *See Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

42. *See Yoder*, 406 U.S. at 241–42 (Douglas, J., dissenting).

43. *Id.* at 244.

44. *See Poe v. Ullman*, 367 U.S. 497, 521–22 (1961) (quoting R. L. Calhoun, *Democracy and Natural Law*, 5 NAT. L. F. 31, 36 (1960)) ("One of the earmarks of the totalitarian understanding of society is that it seeks to make all subcommunities—family, school, business, press, church—completely subject to control by the State. The State then is not one vital institution among others: a policeman, a referee, and a source of initiative for the common good. Instead, it seeks to be coextensive with family and school, press, business community, and the Church, so that all of these component interest groups are, in principle, reduced to organs and agencies of the State. In a democratic political order, this megatherian concept is expressly rejected as out of accord with the democratic understanding of social good, and with the actual make-up of the human community.").

from violence)—platform from which they may find their own way in life. The difficulty is in distinguishing platforms of support and channels to orthodox choices.

The Italian town of Reggio Emilia has famously avoided the Scylla of indoctrination and the Charybdis of neglect by creating preschools that nurture, not by feeding information and instruction, but instead by encouraging activities that honor each child's independence, encourage collaboration rather than hierarchy, and demonstrate faith that children will learn as they follow their curiosity.⁴⁵

The principle of family announced in *Meyer* and followed in *Pierce* is admirable, but Justice Douglas was right to caution that we owe respect both to the dignity of independent families and to the dignity and the unknowable potential of a developing child. Social support need not be totalitarian, and as the Reggio schools demonstrate, education systems can be designed to liberate rather than to indoctrinate.

C. *DeShaney v. Winnebago County Department of Social Services* and *Castle Rock v. Gonzales*: The Tension Between Public Safety and Family Privacy

The last cases—*DeShaney v. Winnebago County Department of Social Services*⁴⁶ and *Castle Rock v. Gonzales*⁴⁷—present the dangers of failures of support. They are representative of a jurisprudential tradition that insists that our constitution is one of negative, not positive rights. That tradition guarantees freedom from government intervention, but does not confer positive rights or benefits.

The dissenting justices in *Obergefell v. Hodges*, the same-sex marriage case, most recently and prominently relied on this tradition.⁴⁸ Justice Roberts said, for example that “[o]ur cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State.”⁴⁹ In support of this assertion, the Chief Justice cited *DeShaney* as well as *San Antonio Independent School District v. Rodriguez*,⁵⁰ a case arguably holding that our federal

45. See CAROLYN EDWARDS ET AL., *THE HUNDRED LANGUAGES OF CHILDREN: THE REGGIO EMILIA APPROACH TO EARLY CHILDHOOD EDUCATION* (1993).

46. 489 U.S. 189 (1989).

47. 545 U.S. 748 (2005).

48. 135 S. Ct. 2584 (2015).

49. *Id.* at 2620 (Roberts, C.J., dissenting).

50. 411 U.S. 1 (1973).

constitution contains no guarantee of a right to education. As I will discuss later, Justice Roberts could also have cited *Gonzales*.⁵¹

DeShaney involved the claim of a child who had been severely brain-damaged as a result of repeated beatings by his father.⁵² The family had been under the supervision of an official child protective agency for more than two years⁵³ during which the child was twice hospitalized as a result of his father's violence.⁵⁴ The child's claim was that as a matter of due process this government agency owed him a duty of protection that it had negligently failed to meet.⁵⁵ A majority of the Justices rejected the child's claim, holding, in effect, that it was what Justice Roberts described in his *Obergefell* dissent: an unauthorized request for positive rights.⁵⁶

The *Gonzales* case was similar.⁵⁷ Jessica Gonzales had been a victim of domestic violence.⁵⁸ She had gone to a local court and obtained a strongly worded order of protection.⁵⁹ The strong wording reflected feminist efforts over the years to assure that such orders would provide some measure of actual protection.⁶⁰ The order announced that the arrest of her abusive husband was mandatory in the face of reasonable evidence of a violation of its terms.⁶¹

Jessica Gonzales called her local precinct repeatedly over the course of an evening to report that her husband had taken their three daughters in violation of the order and that she feared for her daughters' safety.⁶² With each call, she was told to wait to see what happened and to call back if the matter was not resolved. Finally,

51. See *infra* notes 57–69 and accompanying text.

52. See *DeShaney v. Winnebago Cty. Dep't. of Soc. Servs.*, 489 U.S. 189, 191–93 (1989).

53. See *id.*

54. See *id.*

55. See *id.*

56. Compare *id.* at 204 (“The Court’s baseline is the absence of positive rights in the Constitution and a concomitant suspicion of any claim that seems to depend on such rights.”), with *Obergefell v. Hodges*, 135 S. Ct. 2584, 2620 (2015) (Roberts, C.J. dissenting).

57. See *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

58. See *id.* at 751.

59. See *id.*

60. See *id.* (alteration in original) (“The original form order, issued on May 21, 1999, and served on respondent’s husband on June 4, 1999, commanded him not to ‘molest or disturb the peace of [respondent] or of any child,’ and to remain at least 100 yards from the family home at all times.”).

61. See *id.* at 752.

62. See *id.* at 753.

after midnight, she went to the precinct.⁶³ While she was there her husband drove by, firing from his car window at the police station.⁶⁴ The husband was killed by police officers' return fire.⁶⁵ The bodies of the three girls were found in the trunk of his car.⁶⁶

The Supreme Court held that the police had not violated a constitutionally enforceable duty.⁶⁷ Subsequently, however, the Inter-American Commission on Human Rights issued a decision finding the United States responsible for human rights violations against Jessica Gonzales (then Jessica Lenahan) and her three deceased children for its failure to take adequate measures to address domestic violence.⁶⁸ The Commission relied on principles developed to assure that governments address the realities of intra-familial abuse and pervasive violence against women by providing appropriately respectful and reasonably effective mechanisms against domestic violence.⁶⁹ In doing so, it honored the dignity of women and their children while giving appropriate respect to the dignity and liberty of their families.

CONCLUSION

What can we make of these cases and of the state of our laws regarding families and children? Do we as a society have an obligation to give children the physical and intellectual support to become active members of a democratic citizenry? Do we have the right—or the obligation—to expose them to ideas and opportunities that their families may not favor? How do we protect a healthy diversity and guard against totalitarian control? Putting aside the question of whether we owe children any duty of nurturance or any platform for choosing their own way and fulfilling their unique potential, do we owe them any duty of basic protection?

These questions defy simple answers. But there are guides we might follow as we attempt to resolve them: (1) we might join the increasing number of nations that hold themselves, by constitution or

63. *See id.* at 753–54.

64. *See id.* at 754.

65. *See id.*

66. *See id.*

67. *See id.* at 768.

68. *See generally* Gonzales v. United States, Case 12.626, INTER-AM. COMM'N H.R., Report No. 80/11 (2011).

69. *See id.* Additional materials concerning *Gonzales* are available online. *See* AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/cases/jessica-gonzales-v-usa> [<https://perma.cc/HN6E-VTFA>].

international treaty, obligated to respect the dignity of all human beings and accept the possibility that respect for human dignity implies positive obligations of nurturance and care, (2) we might bind ourselves to honor the fact that respect for human dignity implies respect for diverse life choices,⁷⁰ and (3) we might commit ourselves to struggling to reconcile these two propositions, for although both are honorable they are all too easily at war with each other.

Attention to these guides would do much to assure that little citizens thrive within democratically free families.

70. See Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1349 (1994) (“[N]eglected [antislavery] traditions embody, and the second of the Reconstruction Amendments constitutionalizes, a requirement that each person be given a measure of autonomy appropriate to the thinking, morally conscious character of humankind: autonomy sufficient to allow self-definition and substantial moral choice. Antislavery traditions also embody, and the Fourteenth Amendment also reflects, recognition that self-definition and moral autonomy depend upon an environment in which the socializing influences of families and other intimate communities are not overwhelmed by the socializing influences of the state—an environment in which chosen systems of values interact, rather than one in which choice is inhibited and values are absolute and imposed.”).